No. 80-933

In the Supreme Court of the United States

OCTOBER TERM, 1980

PHYSICIANS NATIONAL HOUSE STAFF ASSOCIATION, ET AL., PETITIONERS

v.

BETTY SOUTHARD MURPHY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked jurisdiction to review the Board's dismissal of representation petitions covering certain medical interns, residents, and clinical fellows ("housestaff") whom the Board found to be students, rather than employees, and therefore not covered by the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 8a-52a)[1] is not yet officially reported. The earlier opinion of a panel of the court of appeals (Pet. App. 53a-76a) is not yet officially reported. The memorandum opinion of the district court (Pet. App. 86a-105a) is reported at 443 F. Supp. 806.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1980. On September 30, 1980, the Chief Justice granted an extension of time in which to file a petition for a writ of certiorari to and including December 8, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*) are set forth at Pet. App. 1a-7a.

STATEMENT

1. In 1974, Congress amended the National Labor Relations Act ("the Act") to extend the jurisdiction of the National Labor Relations Board to nonprofit hospitals and other health care institutions.[2] Following the enactment of the health care amendments, a number of organizations, including the petitioners herein, filed petitions with the Board seeking to represent and bargain collectively on behalf of interns, residents, and clinical fellows ("housestaff") at certain nonprofit teaching hospitals. On March 23, 1976, the Board issued its decision in *Cedars-Sinai Medical*

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[1]Due to a printing error, the majority and dissenting opinions are commingled. The majority opinion starts at Pet. App. 8a-14a and continues at 19a-21a. The dissenting opinion starts at Pet. App. 15a-18a and continues at 27a-52a.

[2]Pub. L. No. 93-360, 88 Stat. 395.

Center, 223 N.L.R.B. 251 (Pet. App. 172a-230a), in which it concluded that housestaff members, although possessing "certain employee characteristics," are "primarily engaged in graduate educational training" and "their status is therefore that of students rather than of employees" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3) (Pet. App. 176a, 186a).[3] The Board explained (Pet. App. 186a-188a):

> They participate in these programs not for the purpose of earning a living; instead they are there to pursue the graduate medical education that is a requirement for the practice of medicine. An internship is a requirement for the examination for licensing. And residency and fellowship programs are necessary to qualify for certification in specialties and subspecialties. While the housestaff spends a great percentage of their time in direct patient care, this is simply the means by which the learning process is carried out. It is only through this direct involvement with patients that the graduate medical student is able to acquire the necessary diagnostic skills and experience to practice his profession. The number of hours worked or the quality of the care rendered to the patients does not result in any change in monetary compensation paid to the housestaff members. The stipend remains fixed and it seems clear that the payments are more in the nature of a living allowance than compensation for services rendered. Nor does it appear that those applying for such programs attached any great significance to the amount of the stipend. Rather their choice was based on the quality of educational program and the opportunity for

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[3]Chairman (then Member) Fanning dissented from the Board's decision (Pet. App. 193a-219a).

> an extensive training experience. The programs themselves were designed not for the purpose of meeting the hospital's staffing requirements, but rather to allow the student to develop, in a hospital setting, the clinical judgment and the proficiency in clinical skills necessary to the practice of medicine in the area of his choice. The "[e]ssentials," which describe the standards for approved internships and residencies, indicate that the primary function is educational. Moreover, the tenure of a member of the housestaff at Cedars-Sinai is closely related to the length of the student's training program; thus few interns, residents, or clinical fellows can expect to, or do, remain to establish an employment relationship with Cedars-Sinai following the completion of their programs.[4]

Accordingly, the Board dismissed the representation petition. Several other petitions were dismissed in cases in which the housestaffs were found to be "essentially like those involved in *Cedars-Sinai* in terms of their relationship

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[4]Noting that its "decision rests on the fundamental difference between an educational and an employment relationship" (Pet. App. 190a), the Board observed "that the medical education and training of a physician" go beyond medical school "to a period of more advanced training in a specialty or subspecialty of medicine" (Pet. App. 177a), and that internship, residency, and clinical programs are, in fact, "[g]raduate medical education" (Pet. App. 177a-178a). Furthermore, standards used in these programs must be satisfied "to qualify for licensing and for certification in a specialty or subspecialty[,] [and] are governed by national medical organizations * * * and by state licensing authorities" (Pet. App. 178a-179a). The Board also noted that Cedars-Sinai and its internship and residency programs were accredited by these groups, and that the hospital was affiliated with the UCLA Medical School, of whose faculty most of Cedars-Sinai's 67 full-time and part-time physicians were members (Pet. App. 179a-180a). The various "training programs consist[ed] of patient care activities designed to develop the student's clinical judgment and proficiency in clinical skills" (Pet. App. 182a), including "grand rounds, teaching rounds, laboratory instruction, seminars, and lectures" (Pet. App. 183a).

with the [e]mployer." *St. Clare's Hospital & Health Center,* 223 N.L.R.B. 1002 (1976), reaffirmed, 229 N.L.R.B. 1000 (1977) (Pet. App. 257a).[5] See also *St. Christopher's Hospital,* 223 N.L.R.B. 166 (1976); *University of Chicago Hospitals,* 223 N.L.R.B. 1032 (1976); *Buffalo General Hospital,* 224 N.L.R.B. 76 (1976); *Wayne State University,* 226 N.L.R.B. 1062 (1976).

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[5]In reaffirming, on a motion for reconsideration, its decision in *St. Clare's Hospital,* the Board further explained that, in cases where

> individuals are rendering services [at their educational institutions] which are directly related to—and indeed constitute an integral part of—their education program, they are serving primarily as students and not primarily as employees. In our view this is a very fundamental distinction for it means that the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. [Pet. App. 270a-271a; footnote omitted.]

The Board added that while the collective bargaining process under the Act is "designed to promote equality of bargaining power * * * the student-teacher relationship is an inherently inequalitarian one, it being assumed that the teacher, by virtue of superior knowledge and experience, is in a better position to determine the most appropriate course of instruction and method of proceeding" (Pet. App. 273a-274a). Thus, it would undermine the academic relationship to inject collective bargaining into, for example, the "subject of hours" (Pet. App. 275a), which, of course, is a mandatory subject for bargaining between employers and the representatives of their employees (Pet. App. 276a):

> Residents and interns work notoriously long hours. From a strictly educational standpoint, such hours may be necessary in order to provide the students with as broad an experience as possible * * *. Unfortunately, medical emergencies do not always conveniently occur between the hours of 9 a.m. and 5 p.m., Monday through Friday. Thus, the flexibility which medical educators need to schedule shifts, assignments, transfers, etc., in an educationally sound fashion could become bargainable should the housestaff be afforded collective-bargaining privileges.

2. Petitioners filed the instant suit (Pet. App. 324a-362a) in the United States District Court for the District of Columbia and asked the court to: (1) vacate the Board's dismissal of petitioners' representation petitions, (2) declare that petitioners are labor organizations and their members employees within the meaning of the Act, and (3) order the Board to assume jurisdiction over petitioners. The Board moved for dismissal on the grounds that the district court did not have jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted. Alternatively, pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, the Board moved for summary judgment (Pet. App. 408a-411a). The district court dismissed the complaint, stating (Pet. App. 104a):

> Absent a plain violation of a mandatory provision of the National Labor Relations Act, this court may not strike down the Board's order denying plaintiffs the status of labor organizations. Regardless of the equities of the situation, this court can find no Congressional creation of a right of house staff members to be employees within the meaning of the Act. Without such a right, it is difficult to see how this case can fit into the narrow exception created by the Supreme Court in [*Leedom* v.] *Kyne*, [358 U.S. 184 (1958)] and *Boire* [v. *Greyhound Corp.*, 376 U.S. 473 (1964)]. Because of this, this case must be dismissed since this court has no jurisdiction to hear it.

Petitioners appealed the district court's dismissal order to the court of appeals.[6] A divided panel of the court of

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[6]In the meantime, this Court denied a petition for a writ of certiorari in *NLRB* v. *Committee of Interns & Residents & New York State Labor Relations Board*, 566 F. 2d 810 (2d Cir. 1977), cert. denied, 435 U.S. 904 (1978). (Pet. App. 121a-139a). In that case, the Second Circuit, in agreement with the Board, held that the National Labor Relations Act preempted state jurisdiction over representation questions involving

appeals reversed the district court on the ground that the exception to the general rule precluding direct review of Board representation determinations, set forth in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), "applies to this case" (Pet. App. 55a). Pursuant to the Board's petition, the full court of appeals subsequently vacated the panel's opinion and judgment and ordered that the case be reheard *en banc* (Pet. App. 83a-85a).

By a 5-4 vote, the *en banc* court of appeals affirmed the district court's dismissal of the complaint for lack of jurisdiction. The court explained that, in order to qualify for the *Leedom* v. *Kyne* exception to the general rule precluding district court review of Board representation determinations, "a plaintiff must be able to identify a specific provision of the Act which, although it is 'clear and mandatory' [358 U.S. at 188], has nevertheless been violated by the Board. That the Board may have made an error of fact or law is insufficient; the Board must have acted without statutory authority" (Pet. App. 13a). The court concluded that petitioners had not made such a showing here. It noted that the term "employee" is undefined by statute and, accordingly, "[w]hether a particular individual is an employee depends upon the facts." Moreover, the "task of decision on the facts of each case is assigned to the National Labor Relations Board and in making that decision the Board exercises its informed discretion" (Pet. App. 19a). Therefore, the Board "acted within its jurisdiction" in "carefully analyz[ing] the facts and reach[ing] the conclusion that

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housestaffs of hospitals subject to the Board's jurisdiction. (Contrary to petitioners' contention (Pet. 33, 54), the Second Circuit's decision is not in conflict with the decision here. As both the majority and the dissenting judges in the court below recognized (Pet. App. 11a n.2, 15a n.2), the Second Circuit expressly reserved judgment on the question whether the housestaff members there involved were "employees" (566 F. 2d at 816)).

interns, residents, and clinical fellows are primarily engaged in graduate educational training and that their status is therefore that of students rather than of employees" (Pet. App. 20a). The court of appeals found nothing in the definition of "professional employees" contained in Section 2(12) of the Act, 29 U.S.C. 152 (12), or the legislative history of the 1974 Health Care Amendments that conflicted with the Board's disposition of the petitions in this case (Pet. App. 21a-23a).

The dissenting judges were of the view that "the *Kyne* exception applies to this case" (Pet. App. 16a) because "the legislative histories of the NLRA and the 1974 Health Care Amendments to that statute affirmatively demonstrate a congressional intent to cover house staff under the Act" (Pet. App. 31a).003

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is unwarranted.

1. The National Labor Relations Act does not provide for direct review of Board determinations in representation proceedings. It permits review of such determinations only to the extent authorized by Section 9(d) of the Act, 29 U.S.C. 159(d). Under Section 9(d), representation determinations are reviewable only when they form the basis for a final order issued in an unfair labor practice proceeding and that order is before the court of appeals for enforcement or review under Section 10(e) or (f) of the Act, 29 U.S.C. 160(e) or (f). See *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 409 (1940); *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964); *May Department Stores Co.* v. *NLRB*, 326 U.S. 376, 379 (1945). Contrary to petitioners' contention (Pet. 41-49), the rule that a representation determination is not reviewable unless it "eventuates in a

finding by the Board that an unfair labor practice has been committed * * * " (*Boire* v. *Greyhound Corp., supra,* 376 U.S. at 477) is more than a requirement that a party to a representation proceeding exhaust its administrative remedies before seeking judicial review. Instead, the rule embodies a policy choice by Congress to authorize only *administrative* resolution of representation questions which do not ultimately result in an unfair labor practice proceeding.[7]

The legislative history of the 1935 Act (the Wagner Act) discloses that Congress, after balancing the advantages of permitting direct review of Board representation determinations against the disadvantages—especially the likelihood that direct review would result in dilatory tactics in representation proceedings—deliberately decided to preclude such review.[8] In 1939, Congress was asked to reconsider the question of direct review of Board representation determinations and declined to change the limited review provisions of the Wagner Act.[9]

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[7]There is no doubt that Congress may prescribe an administrative remedy to the exclusion of a judicial remedy. See *Switchmen's Union of North America* v. *National Mediation Board,* 320 U.S. 297, 301 (1943) ("[I]t is for Congress to determine how the rights which it creates shall be enforced"). See also *Morris* v. *Gressette,* 432 U.S. 491, 501 (1977); *Schilling* v. *Rogers,* 363 U.S. 666, 674 (1960); *Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309, 318-319 (1958).

[8]See S. Rep. No. 573, 74th Cong., 1st Sess. 5-6 (1935), reproduced in 2 *Legislative History of the National Labor Relations Act of 1935,* 2305 (1948) (hereinafter referred to as "2 *Leg. Hist.*"). See also H.R. Rep. No. 1147, 74th Cong., 1st Sess. 7 (1935); 2 *Leg. Hist., supra,* at 3053. See generally, *Leedom* v. *Kyne,* 358 U.S. 184, 191-197 (1958) (Brennan, J., dissenting).

[9]See *Hearings on S. 1000, etc., before the Senate Comm. on Education and Labor,* 76th Cong., 1st Sess., Pt. 1,460-463, 584-585 (1939); *American Federation of Labor* v. *NLRB, supra,* 308 U.S. at 409-411; *Madden* v. *Brotherhood,* 147 F. 2d 439, 443-445 (4th Cir. 1945).

The problem was again considered by Congress in 1947 when it enacted the Taft-Hartley amendments to the Act. Section 10(f) of the House bill, following the 1939 proposal, would have provided for direct review by the courts of appeals of Board certifications (H.R. Rep. No. 245, 80th Cong., 1st Sess. 43, 59-60 (1947); 1 *Legislative History of the Labor Management Relations Act of 1947*, 334, 350-351 (1948)) (hereinafter referred to as "1 *Leg. Hist.*"). The House Report explained that such an amendment was desirable because, *inter alia*, the Act, as then structured, was unfair to "the union that loses, which has no appeal at all no matter how wrong the certification may be." H.R. Rep. No. 245, *supra*, at 43; 1 *Leg. Hist., supra*, at 334. In conference, this provision was eliminated. Congress decided to retain the limited review provision contained in Section 9(d) of the original Act. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 56-57 (1947); 1 *Leg. Hist., supra*, at 560-561.

2. In *Leedom* v. *Kyne*, 358 U.S. 184 (1958), this Court carved out a limited exception to the general rule of non-reviewability of representation determinations. There, district court jurisdiction was found to exist when the Board directed an election in an admittedly mixed bargaining unit of professional and nonprofessional employees without first having "a majority of such professional employees vote for inclusion in such unit" as expressly required by Section 9(b)(1) of the Act, 29 U.S.C. 159(b)(1). This Court explained that the district court had jurisdiction since the Board had acted in violation of a "clear and mandatory" provision of the statute, thereby depriving the professional employees of a right guaranteed them by the Act. 358 U.S. at 188, 190-191.

In *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964), however, the Court explained that the *Kyne* exception does not encompass questions of whether a statutory provision has been correctly applied to the facts of a particular case.

There, the Board's election order was challenged in the district court on the ground that the facts found by the Board did not support the Board's determination that Greyhound was a joint employer of certain employees. In holding that the district court lacked jurisdiction, this Court stated (376 U.S. at 481-482):

> [W]hether Greyhound possessed sufficient indicia of control to be an "employer" is essentially a factual issue, unlike the question in *Kyne*, which depended solely upon construction of the statute. The *Kyne* exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law. Judicial review in such a situation has been limited by Congress to the courts of appeals, and then only under the conditions explicitly laid down in § 9(d) of the Act.

Moreover, this Court has stated that its decision in *Kyne*

> * * * was no exception to *Switchmen's Union* [v. *National Mediation Board*, 320 U.S. 297 (1943)]. Rather the Court was careful to note that "[t]his suit is not one to 'review,' in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather, it is one to strike down an order of the Board made in excess of its delegated powers and contrary to *a specific prohibition in the Act.*" *Leedom* v. *Kyne*, 358 U.S. 184, 188. (Emphasis supplied [by the Court].) * * *.

Brotherhood of Railway & Steamship Clerks v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 659-660 (1965).

3. The court of appeals correctly concluded (Pet. App. 20a) that the Board did not violate an express statutory mandate or exceed its statutory authority in finding, in *Cedars-Sinai* and the other related cases, that housestaff members, although " 'possess[ing] certain employee characteristics,' " are "primarily engaged in graduate educational training" and "their status is therefore that of students rather than of employees" within the meaning of Section 2(3) of the Act.[10]

a. Except for excluding certain categories of individuals from the statutory definition of "employee," Section 2(3) provides only that "[t]he term 'employee' shall include any employee * * * ." The task of formulating a "completely definitive limitation around the term 'employee' * * * has been assigned primarily to the agency created by Congress to administer the Act." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944). It is the duty of the Board "to apply this broad statutory language to varying fact patterns" (*Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 303-304 (1977)), and to "determin[e] in the first instance who is an employee for purposes of the National Labor Relations Act." *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947).

In discharging this responsibility, the Board frequently is faced with situations in which an individual has some of the characteristics of an "employee" and some characteristics indicating a different status. In those circumstances, the Board must determine whether the "employee" characteristics predominate over the other characteristics. For example,

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[10]The dissenting judges in the court below agreed that the district court had jurisdiction only if the suit fell within the *Kyne* exception. They differed with the court majority only over whether petitioners had demonstrated that the Board violated an express statutory mandate or otherwise had exceeded its statutory authority (Pet. App. 16a, 31a, 37a).

managerial employees and supervisors, both of whom are excluded from the Act's coverage, have many attributes of covered "employees" and hence the Board must determine in each case whether the managerial or supervisory elements outweigh the "employee" elements. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB* v. *Swift & Co.*, 292 F. 2d 561, 563 (1st Cir. 1961). Cf. *Boire* v. *Greyhound Corp.*, *supra*, 376 U.S. at 481 ("[W]hether Greyhound possessed sufficient indicia of control to be an 'employer' is essentially a factual issue" for the Board to determine). Similarly, when individuals have the characteristics of both "students" and "employees," the Board must determine which characteristics are predominant in the particular situation.[11] The Board thus "acted within its jurisdiction" in "carefully analyz[ing] the facts" and in deciding whether the interns, residents and clinical fellows in the cases before it were primarily "students" or "employees" (Pet. App. 20a).

Moreover, the Board's conclusion that the housestaff members in these cases have essentially a student/teacher relationship with the teaching hospitals, rather than an employee/employer relationship, is a reasonable one. The facts show that housestaff members are associated with the hospitals primarily for the purpose of completing their medical education. Their hospital duties are part and parcel of the educational process, and are designed to constitute part of their training. The academic aspects of their relationship with the hospitals are largely inseparable from

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[11]See *Leland Stanford Junior University*, 214 N.L.R.B. 621, 623 (1974) (dismissing representation petition covering research assistants who were "primarily students"); *Adelphi University*, 195 N.L.R.B. 639, 640 (1972); *Clark County Mental Health Center*, 225 N.L.R.B. 780 (1976) (excluding clinical psychology interns who were "primarily students").

their "employee" duties. (See pages 2-4, *supra* & notes 4, 5.)[12]

b. Contrary to the view of petitioners (Pet. 49-52) and the dissenting judges below (Pet. App. 33a-34a), the Board's conclusion that the housestaff members involved here are not "employees" for purposes of the Act is not at odds with Section 2(12) of the Act, 29 U.S.C. 152(12). Section 2(12) defines "professional employee" to include

> (a) any employee engaged in work * * * (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital * * * ; or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is per-

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[12]There is no merit to petitioners' contention (Pet. 57-59) that the Board has established a *per se* rule that excludes an entire class of persons from the coverage of the Act. The Board considered the facts of each case, but reached the same result because it found the operative facts in each case to be similar. See *St. Clare's Hospital & Health Center*, 229 N.L.R.B. 1000 (1977). See also *University of Chicago Hospitals*, 223 N.L.R.B. 1032 (1976). ("The interns and residents involved herein are not unlike those interns and residents involved in *Cedars-Sinai*. Therefore, we conclude that they are primarily students.") Should the Board be presented with a variant factual pattern, or should significant changes be made in medical educational practices, the Board may well reach a conclusion different from that in the cases involved here.

That housestaff members have been found to be "employees" under other laws having other purposes (Pet. 62-63) does not impair the validity of the Board's finding that the housestaff personnel in the cases before it were not "employees" for purposes of the National Labor Relations Act. See *NLRB* v. *Randolph Electric Membership Corp.*, 343 F. 2d 60, 64-65 (4th Cir. 1965).

> forming related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

As the court below correctly noted (Pet. App. 21a), "[b]ecause this definition is applicable to 'any employee,' it is not a command to the Board to regard anyone as an employee. Rather, it classifies those persons who are already employees. House staff can not be 'professional employees' unless they are first found to be 'employees.' "[13] Similarly, while the House Conference Report on the Taft-Hartley amendments to the Act describes this definition as applying to "such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants,"[14] the Report refers to persons in those fields who are otherwise properly viewed as "employees."[15] In short, Section 2(12) merely defines those employees subject to the Act's coverage who are professionals. It does not imply that students, who are not employees, should be covered by the Act solely because some of their activities have professional characteristics.

Also unavailing is the attempt of the dissenting judges below (Pet. App. 34a-36a) to derive a specific statutory directive to treat housestaff members as "employees" from the legislative history of the 1974 Health Care Amendments. While the committee reports do show that Congress

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[13]Section 2(12) was added to the Act to identify those persons meeting the definition of "employee" in Section 2(3), who, under the newly added Section 9(b)(1), were protected against involuntary inclusion in a unit with nonprofessional employees. See S. Rep. No. 105, 80th Cong., 1st Sess. 19 (1947); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947); 93 Cong. Rec. 3836, 6501 (1947).

[14]H.R. Conf. Rep. No. 510, *supra*, at 36.

[15]See *e.g.*, *Mercy Hospitals of Sacramento Inc.*, 217 N.L.R.B. 765, 768 (1975) (nurse permittees who work under the supervision of registered nurses are employees).

had considered proposals to amend Section 2(11) of the Act, 29 U.S.C. 152(11), so as to exclude housestaff members and other persons from the statutory definition of "supervisor," Congress, after noting the Board's carefully developed standards for applying Section 2(11) to health care professionals, did not enact the proposed amendments to Section 2(11). Rather, Congress left such determinations to the Board's informed discretion, stating that it expected the Board "to continue evaluating the facts of each case * * * when making its determinations." S. Rep. No. 93-766, 93d Cong., 2d Sess. 6 (1974); H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 7 (1974). Moreover, the remarks of Senators Cranston and Dominick concerning housestaff personnel[16] "indicate at most that these senators believed that the Board's evaluation of the facts would lead it to the conclusion that house staff are employees." They "stop short of showing, however, that these senators thought the bill required that house staff be considered employees" (Pet. App. 23a).

As the court below noted (Pet. App. 23a), in the years since *Cedars-Sinai* was decided, Congress has had several opportunities to enact legislation that would include housestaff members within the statutory definition of employee, but has declined to do so. Indeed, in 1979 a bill to overrule the Board's housestaff decisions was defeated in the House of Representatives after extensive debate. In opposing the bill (H.R. 2222, 96th Cong., 2d Sess. (1979)), Congressman Erlenborn, a member of the House Labor Committee when the 1974 Health Care Amendments were enacted, responded to the assertion that the Board's refusal to find that interns and residents were employees was contrary to the legislative intent of the 1974 amendments (125 Cong. Rec. H11300 (daily ed. Nov. 28, 1979)):

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[16]120 Cong. Rec. 12937, 12971, 22580 (1974).

> * * * [T]he basic question is: Are these students or are they employees? The fact is that under the current law there is no prohibition against the NLRB recognizing a union to bargain for interns and residents if they are primarily employees.
>
> This really is not a question of law. It is a question of fact. In the Cedars-Sinai Hospital decision, which is cited as being an error on the part of the Board, is not an error in the interpretation of the law. It is a question of what they found after extensive hearings to be the fact.

Thus, the agency's actions here are presumptively correct because they involve "issues of considerable public controversy, and Congress has not acted to correct any misperception of its statutory objectives." *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979); *Zemel* v. *Rusk*, 381 U.S. 1, 11 (1965); *United States* v. *Bergh*, 352 U.S. 40, 46 (1956).

4. Petitioners' reliance (Pet. 44-45) on the per curiam decision in *Hotel Employees Local No. 255* v. *Leedom*, 358 U.S. 99 (1958), is misplaced. There, the Board was found to have acted outside the ambit of its statutory authority in declining jurisdiction over the hotel industry, contrary to an earlier decision of this Court holding that the Board lacked power to decline jurisdiction over an entire category of persons acknowledged to be employers. Here, by contrast, the Board has power to decide whether individuals are "students" or "employees," and it did so on the basis of the facts of this particular case. Similarly, in *Leedom* v. *International Union of Mine, Mill & Smelter Workers*, 352 U.S. 145 (1956), this Court's holding that a district court could enjoin the Board from denying the benefits of the Act to a union that had filed the noncommunist affidavits then required by Section 9(h) of the Act, 29 U.S.C. 159(h), was

premised on a finding that the Board lacked statutory authority to disqualify the union. Accord, *Amalgamated Meat Cutters* v. *NLRB*, 352 U.S. 153 (1956).[17]

5. Petitioners finally contend (Pet. 64-65) that the Board's decisions in *Cedars-Sinai* and related cases violate the Tenth Amendment as construed in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). However, *National*

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[17]The court of appeals decisions relied on by petitioners (Pet. 52-54) also deal with unrelated issues. In *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856, 860-861, 864 (4th Cir. 1961), the court simply held that the district court could assert jurisdiction where the Board violated the Administrative Procedure Act by unreasonably delaying adjudication of an unfair labor practice proceeding; no Board representation determination was involved. *Id.* at 860 n.3. Moreover, *Deering Milliken* was overruled by *Califano* v. *Sanders*, 430 U.S. 99 (1977). In *Surratt* v. *NLRB*, 463 F. 2d 378, 381 (4th Cir. 1972), and *Templeton* v. *Dixie Color Printing Co.*, 444 F. 2d 1064, 1068-1069 (5th Cir. 1971), the courts upheld district court jurisdiction where the Board violated the *express command* of Section 9(c)(1) of the Act, 29 U.S.C. 159(c)(1), by mechanically invoking its "blocking charge" rule to bar any consideration of employee-filed decertification petitions. Noting that Section 9(c)(1) provides that the Board *shall* act on a petition if it finds that "a question of representation exists," the courts ruled that Section 9(c)(1) expressly requires that the Board affirmatively investigate each petition. As the *Surratt* panel explained, "the Board should not be allowed to apply its 'blocking charge practice' as a *per se* rule without exercising its discretion to make a careful determination in each individual case whether the violation alleged is such that consideration of the election petition ought to be delayed or dismissed." 463 F. 2d at 381. Compare *Bishop* v. *NLRB*, 502 F. 2d 1024, 1030-1032 (5th Cir. 1974), where the Board invoked its blocking charge rule *after* the investigation; the court of appeals held that, since the Board had remained "within the boundaries of its statutory mandate with respect to representation questions * * * the district court has no subject matter jurisdiction * * *." *Id.* at 1032. Finally, in *Terminal Freight Handling Co.* v. *Solien*, 444 F. 2d 699, 703-704 (8th Cir. 1971), cert. denied, 405 U.S. 996 (1972), district court jurisdiction was upheld where the Board's Regional Director made factual findings that *required* him to petition for an injunction under Section 10(l), but nevertheless failed to do so.

League of Cities addressed the problem raised "when Congress seeks to regulate directly the activities of States as public employers." 426 U.S. at 841. Nothing of that kind has occurred in this case, since the health care institutions here involved are private employers. Congressional power to regulate labor-management relations is firmly established under the Commerce Clause, and inconsistent state efforts to regulate those relations must yield under the Supremacy Clause. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 773-774 (1947).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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